

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant worked for respondent as a loader and unloader for approximately 1½ years before experiencing left wrist pain on or about January 12, 2006. Claimant was a part-time worker, averaging 4 hours per day and 5 days per week. He would also help drivers deliver packages during holiday periods. His work activities required he lift up to 60 pounds repetitively.

Claimant testified that he gradually began developing stiffness in his left wrist. This stiffness extended from his left wrist to his mid forearm. By Friday, January 13, claimant's wrist had become "stiffer and stiffer."<sup>1</sup> Claimant also began to experience slight pain in the wrist and numbness in his fingers and thumb. Claimant went home after working on January 13 and did nothing over the weekend. By Sunday, claimant was experiencing a sharp pain in his left wrist when he moved his left hand.

Claimant was scheduled to work Monday, but did not. He sought medical treatment at Minor Med in Topeka Kansas on January 16, 2006. He was diagnosed with tendinitis of the left wrist and placed on restricted duty of no lifting greater than 5 pounds and no repetitive use of the left wrist. He was given a wrist splint to wear. In the history provided to Minor Med, the onset was listed as January 12, 2006, with no known cause of pain. The Minor Med history also indicated that the onset was after work.<sup>2</sup>

Claimant sought medical treatment with his primary health provider, Richard Douglas Liff, M.D., on January 31, 2006. Dr. Liff's records of that date indicate an onset of January 12, 2006, with "no injury" noted. Claimant was referred to the Tallgrass Orthopedic Clinic for an examination on February 2, 2006, at which time he was examined by Leon W. Herring, P.A. Claimant was diagnosed with left wrist pain, but he denied any particular injury. The onset of pain was listed as approximately two weeks ago, around "the 20<sup>th</sup> of January." There was concern noted regarding a possible fracture or avascular necrosis. A bone scan was ordered on February 17. The bone scan indicated increased activity at the thenar aspect of the left hand and the wrist pain is more proximal to this area. The impression was wrist sprain.

Claimant testified that he informed Jeff Stithem, the preload supervisor, of the problem and that he was seeking medical treatment. Jeff Stithem testified that he was not told by claimant of a work-related accident. Mr. Stithem was told by Chris Devins, the preload supervisor manager, that claimant had called in and reported that he was injured over the weekend. Mr. Stithem denies being provided the slip from Minor Med.

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<sup>1</sup> P.H. Trans. at 14.

<sup>2</sup> *Id.*, Cl. Ex. 1.

Claimant also testified that on January 16, 2006, he told Wordell Hooks, the business manager, that he believed his problem was work related. Mr. Hooks denied being told by claimant on January 16 of a work-related injury, and denied being provided any slip from Minor Med. Mr. Hooks did testify regarding a telephone call which occurred between him, claimant and Nanette Martin, respondent's health and safety manager. He acknowledged that during this telephone call, claimant told him and Ms. Martin that his (claimant's) claim was work related and claimant wanted to claim workers compensation. Mr. Hooks said that claimant told him the doctor said if he did not classify the injury as workers compensation, claimant would not get any money. At or near the conclusion of their conversation, Mr. Hooks asked Ms. Martin to e-mail him about the conversation. He testified that she sent him the e-mail within a week of the conversation, which he thought occurred in January 2006. The date on the e-mail is March 30, 2006.

Paul Anderson, who was respondent's on car supervisor at the time of claimant's injury (and who, at the time of the preliminary hearing, was running respondent's local sort operation), talked to claimant on or around January 16, 2006, regarding a cast claimant had on his left wrist. Mr. Anderson, who is also the co-chair on the safety committee, asked claimant if the injury was work related. Claimant told Mr. Anderson the injury occurred over the weekend.

Claimant was referred by his attorney to board certified orthopedic surgeon Sergio Delgado, M.D., on May 2, 2006. The history of injury provided to Dr. Delgado was similar to that provided to the other health care providers. It does indicate that respondent refused to accept the claim. Dr. Delgado diagnosed claimant with de Quervain's disease or a thumb extensor tendinitis at the left wrist. Treatment recommendations included conservative treatment involving cortisone injections in the thumb to possible tendon sheath sectioning. Dr. Delgado restricted claimant from repetitive pinching or gripping with the left upper extremity and restricted claimant's repetitive lifting to 10 to 15 pounds.

The ALJ, at the preliminary hearing, found claimant to lack credibility. Regarding claimant's testimony that he gave specific notice to the employer that the doctor said this was work related, the ALJ found claimant to not be honest.<sup>3</sup> In fact, when discussing claimant's claim to have told Mr. Hooks that his accident was work related during their conversation on January 16, 2006, the ALJ said, "[o]n that point, to be blunt, I think Mr. Spaulding was lying."<sup>4</sup> Nonetheless, the ALJ then proceeded to award claimant benefits for the alleged injury.

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<sup>3</sup> *Id.* at 96.

<sup>4</sup> *Id.* at 98-99.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>5</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>6</sup>

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.<sup>7</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.<sup>8</sup>

The Board, on many occasions, has given credence to an administrative law judge's determination regarding the credibility of a claimant or of witnesses who testify in the presence of the administrative law judge. Here, the ALJ, after finding this claimant to lack credibility, to not be honest and, on one occasion, to be lying, still awarded benefits for the alleged injury. Claimant's allegations of a work-related injury are contradicted by several medical reports, the testimony of four respondent representatives, and on occasion, by his own testimony. The Board cannot find that this claimant has proven that he suffered accidental injury arising out of and in the course of his employment, based on this record. Therefore, the Order of the ALJ, granting claimant benefits herein, is reversed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Benedict dated June 22, 2006, should be, and is hereby, reversed.

**IT IS SO ORDERED.**

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<sup>5</sup> K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

<sup>6</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>7</sup> *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

<sup>8</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Dated this \_\_\_\_ day of September, 2006.

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BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant  
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier